May 3, 2000

Sent via e-mail and fax, hand delivery or U.S. Mail

Mary L. Cottrell, Secretary

Massachusetts Department of Telecommunications and Energy

One South Station, 2nd Floor

Boston, MA 02110

re: Bell Atlantic-Massachusetts's Local Service Provider Freeze, D.T.E. 99-105

Dear Secretary Cottrell:

Enclosed for filing please find the Attorney General's Objection to MCI WorldCom, Inc.'s Motion for Confidential Treatment, filed April 25, 2000 in response to Record Request AG-RR-1 in the above-referenced proceeding, together with a Certificate of Service.

Sincerely,

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Karlen J. Reed

Assistant Attorney General

Regulated Industries Division

Office of the Attorney General

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KJR/kr

Enc.

cc: Paula Foley, Hearing Officer (w/enc.)

DTE 99-105 service list (w/enc.)

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Investigation by the Department of Telecommunications)

and Energy, on its own motion, as to the propriety of the)

Local Service Provider Freeze terms and conditions set) D.T.E. 99-105

forth in the following tariff: M.D.T.E. No. 10, Part A,)

Section 5, Original of Page 1.1, filed with the Department)

on November 1, 1999 by New England Telephone and)

Telegraph Company d/b/a Bell Atlantic-Massachusetts.)

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ATTORNEY GENERAL'S OBJECTION TO MCI WORLDCOM'S MOTION FOR CONFIDENTIAL TREATMENT IN RESPONSE TO RECORD REQUEST AG-RR-1

The Attorney General objects to the motion filed with the Department of Telecommunications and Energy ("Department") by MCI WorldCom, Inc. ("MCIW") on April 25, 2000, seeking confidential treatment for its response to Record Request AG-RR-1 ("MCIW Motion"). The Attorney General submits that this motion seeks to withhold from the public record relevant information that does not meet the standards for exemption from public disclosure under G.L. c. 25, § 5D.

I. INTRODUCTION

During evidentiary hearings on April 14, 2000, the Attorney General asked MCIW to estimate the cost, in an aggregate form, it would incur if the Bell Atlantic-Massachusetts ("BA-MA") Local Service Provider Freeze ("LSPF") Tariff were implemented as written (Tr. Vol. 2 at 176, 180). MCIW elected to take the request back as Record Request AG-RR-1 (id.). AT&T responded, in open hearings, with its aggregate cost estimate (Tr. Vol. 2 at 260).

On April 25, 2000, MCIW filed its Motion to exclude a portion of its response from the public record on the grounds that the information is "highly confidential and extremely competitively sensitive." Motion at 1. MCIW asserts that "carrier-specific information of this type should not be subject to disclosure to the public or to

other participants in this proceeding" because it "would, if released, provide competitors with valuable information regarding an individual carrier's internal costs and practices, thereby providing competitors with an unfair business advantage." Id. at 2. MCIW contends that this cost estimate should be protected in the same manner as carrier-specific performance report data (id.). MCIW has provided the Attorney General with the unredacted record request response pursuant to the Attorney General's April 7, 2000, nondisclosure agreement.(1)

Based on this review, the Attorney General submits that the putative confidential information does not meet the legal standard for exemption from public record contained in G.L. c. 25, § 5D, and should be part of the public record.

II. MCI WORLDCOM'S RESPONSE DOES NOT QUALIFY FOR PROTECTION FROM PUBLIC DISCLOSURE.

MCIW has not demonstrated that the information sought in AG-RR-1 falls within the narrow statutory standard for protection from public disclosure. Accordingly, the Department should deny this Motion.

A. Legal Standard.

The General Court has mandated that, subject to certain narrow exceptions, the public's business should be conducted in public. The standard of review for motions seeking confidential

treatment is well-settled and comes from G.L. c. 25, § 5D, which provides as follows:

[T]he department may protect from public, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need is found to exist, the department shall protect only so much of the information as is necessary to meet such need.

This statute exempts the Department, "in certain narrowly defined circumstances, from the general statutory mandate that all documents and received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth." Boston Edison Company, D.T.E. 97-95, p. 13-14 (1998). The exemption statute establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure:

First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;"

Second, the party seeking protection must overcome the statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and

Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need.

Boston Edison Company, D.T.E. 97-95, p. 13-14 citing G.L. c. 25, § 5D.

The Department has interpreted the G.L. c. 25, § 5D, standard to prescribe a narrow exemption. See Boston Edison Company; Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

In determining whether certain information qualifies as a "trade secret," Massachusetts courts have considered the following: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and its competitors; (5) the amount of effort or money expended by the employer in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840 (1972) (citing Restatement of Torts, § 757, cmt. b).

B. The response of MCIW should be part of the public record.

The Attorney General submits that MCIW's Motion must fail because MCIW has not demonstrated how the aggregate tariff implementation cost constitutes "trade secrets, confidential, competitively sensitive or other proprietary information." MCIW wrongfully attempts to cloak the estimated dollar amount of tariff compliance under the blanket protections offered by the Department for carrier-specific performance data (Motion at 2). The requested information is not the type of information to which the Department previously has granted confidential treatment. See, e.g., Area Code Conservation, D.T.E. 98-38 (forecasting data) (Hearing Officer Ruling August 19, 1999), or Tel-Save, Inc., D.T.E. 98-59 (written policies and procedures on PIC change requests) (Hearing Officer Ruling October 22, 1998). MCIW's unsupported and, indeed, contradicted assertion that the information is "competitively sensitive" is overreaching and cannot stand.(2)

The Department has construed the Section 5D exemption narrowly and has required carriers even to disclose the identity of customers (cf. Standard of Review for Electric Contracts, supra). The information in question does not rise to this level of sensitivity. The Attorney General submits that MCIW has not overcome the statutory presumption that the information should remain part of the public record under G.L. c. 66, § 10, and G.L. c. 4, § 7, cl. twenty-sixth.

It is important to note that the Attorney General's information requests relate directly to a significant issue in this docket: whether the proposed LSPF tariff as

written will impose burdens on local competition. The public cannot evaluate the resolution of this issue without access to the information in question. The Department should deny MCIW's Motion.

III. CONCLUSION

MCIW has not met its burden of satisfying the requirements of G.L. c. 25, § 5D to exempt from public disclosure that portion of its response to Record Request AG-RR-1 as to its

estimated cost of implementing the BA-MA tariff as written. For all the foregoing reasons, the Department should deny MCIW's Motion.

Respectfully submitted,

THOMAS F. REILLY

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by: Karlen J. Reed

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and either hand delivery, mail, or fax.

Dated at Boston this 3rd day of May 2000.

_____

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1. The Department has said already that a party's willingness to enter into a nondisclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on: (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

2. Indeed, AT&T's voluntary "live" response to the same question at the public evidentiary hearing suggests that it does not view this information as competitively sensitive or confidential.